

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALAN HUDSON,

Defendant-Appellant.

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UNPUBLISHED

March 22, 2005

No. 252851

Oakland Circuit Court

LC No. 2003-190792-FC

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and malicious destruction of a building causing less than \$200 in damages, MCL 750.380(5). He was sentenced, as a fourth habitual offender, MCL 769.12, to fifteen to forty years' imprisonment for the armed robbery conviction and to a jail term of ninety-three days for the malicious destruction of a building conviction. We affirm.

Defendant first argues on appeal that the trial court erred when it permitted the introduction of other-acts evidence under MRE 403(b) and that counsel was ineffective for failing to object to its introduction. We disagree.

The admissibility of other-acts evidence is within the trial court's discretion, and this Court will only reverse when an abuse of discretion is clear. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if (1) it is offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) it is relevant to an issue or fact of consequence at trial, and (3) its prejudicial effect does not substantially outweigh its probative value under MRE 403.<sup>1</sup> *People v VanderVliet*, 444 Mich 52, 55, 74-75, 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Here, the evidence was offered for a proper purpose, to prove identity. "Relevant other acts evidence does not violate MRE 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *VanderVliet*, *supra* at 65.

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<sup>1</sup> MRE 403 provides in relevant part that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

Next, the evidence is logically relevant, tending to prove defendant's identity. A four part test is used to determine logical relevance of similar-acts evidence that is offered to show identification through *modus operandi*. *People v Ho*, 231 Mich App 178, 186, 585 NW2d 357 (1998), citing *People v Golochowicz*, 413 Mich 298, 310; 319 NW2d 518 (1982). This test requires "that (1) there is substantial evidence that the defendant committed the similar act[,] (2) there is some special quality of the act that tends to prove the defendant's identity[,] (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice." *Ho, supra* at 186, citing *Golochowicz, supra* at 307-309. Defendant's 1995 guilty plea to the armed robbery of a gas station was substantial proof that he committed the similar act sought to be introduced. The evidence revealed significant similarity between the two incidents tending to prove identity. Defendant told investigating officers that he always wore black when he did something criminal. He committed the 1995 robbery using a small handgun, wearing black pants, a pullover sweatshirt, a black mask and black gloves. He took the cash box and ordered the victim to lie on the ground. Similarly, testimony in the present case revealed that the suspect wore dark pants, a dark hooded sweatshirt, black gloves, and a dark mask. Moreover, the suspect ordered the victim to open the cash register and to lie on the ground. The facts attendant to the prior armed robbery tended to prove defendant's identity and make it more probable that he was the individual who committed the charged offense. Because defendant maintained an alibi defense, evidence of his identity was material to his guilt.

Whether the evidence was sufficiently probative to substantially outweigh the danger of unfair prejudice is a much closer question. Our Supreme Court has noted that the threshold for admissibility is higher where other acts are used to prove identity than when other acts are used to prove a common scheme or plan. *People v Sabin (After Remand)*, 463 Mich 43, 65; 614 NW2d 888 (2000). In *Golochowicz, supra* at 310, our Supreme Court stated that when other acts are used to prove identity, the "circumstances and manner in which the two crimes were committed [should be] 'so nearly identical in method as to earmark the charged offense as the handiwork of the accused.'" *Id.*, quoting McCormick, Evidence (2d ed), § 190, p 449. While the evidence tended to prove identity, when considered alone, it was certainly not the type of signature evidence that would conclusively distinguish this defendant from other armed robbers. Moreover, the evidence was likely prejudicial because it appears that as a result of the court's ruling, defendant pursued a trial strategy of preemptively introducing the evidence of past crimes and arguing that defendant was being made the "fall guy" by the other witnesses because his criminal record made him an easy target. The similar nature of the crimes also increases the prejudicial nature of the evidence. In such a close question, however, it cannot be said that the trial court abused its discretion. *Sabin, supra* at 67. The determination of whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to the trial court's contemporaneous assessment. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002).

Further, reversal is not required because defendant did not affirmatively establish that it was more probable than not that any error in admitting the other-acts evidence at issue was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The prosecution presented strong evidence of defendant's guilt, including three witnesses who identified the suspect in the surveillance tape as defendant, the testimony of a participant in the robbery implicating defendant, and the testimony of two other individuals reporting defendant

confessed to them. Importantly, this included identification testimony from the store clerk who had no apparent reason to falsely accuse defendant and who also indicated that she was familiar with him as a repeated customer of the store. Similarly, defendant's probation officer watched the surveillance tape and identified defendant based on voice and mannerisms. In contrast, as set forth in the statement of facts, defendant's alibi defense rested on the testimony of himself and two of his associates. In these circumstances, it is more probable than not that the jury would have convicted defendant of armed robbery even without the other-acts evidence.<sup>2</sup>

Next, defendant argues that the trial court erred when it allowed the prosecutor to impeach defendant with past convictions for armed robbery, unarmed robbery and stealing or carrying away a financial transaction device. We disagree.

Defendant failed to preserve this issue. When either constitutional or nonconstitutional errors have not been properly preserved, the defendant must show plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In addition, the defendant must show that the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceeding. *Id.*

The credibility of a witness may be impeached with evidence of prior convictions if those convictions satisfy the criteria in MRE 609. Prior convictions of theft crimes are admissible only if the probative value of the evidence outweighs its prejudicial effect. MRE 609(a)(2). On cross-examination, the prosecutor questioned defendant about the prior convictions at issue. Because defendant faced a charge of armed robbery, the most prejudicial of the past convictions was the prior armed robbery conviction. The other two offenses were quite different from the charged offense, so their introduction was significantly less prejudicial. The court properly considered that all the convictions were less than ten years old. While the age of the convictions makes them less probative of veracity, it also makes them less prejudicial. Moreover, the admission of the convictions did not dissuade defendant from testifying.

The trial court's apparent failure to articulate an analysis is not reversible error because the court was aware of the relevant factors and its discretion prior to admitting the convictions. A trial court's failure to articulate its analysis on the record is error; but if it appears from the record that the court was aware of the relevant factors and its discretion, the error does not itself require reversal. *People v Handley*, 422 Mich 859; 365 NW2d 752 (1985). See also *People v Daniels*, 192 Mich App 658, 670-671; 482 NW2d 176 (1991) (failure to articulate is harmless where no abuse of discretion would have occurred if the court had articulated its analysis on the record). Further, it does not appear that the probative value of the convictions to defendant's

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<sup>2</sup> We reject defendant's ineffective assistance of counsel claim related to the admission of the other acts evidence. First, defendant failed to properly present the issue to this Court in his statement of questions presented. Ordinarily, no point will be considered which is not set forth in the statement of the questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Regardless, defense counsel properly preserved the issue by objecting at the motion hearing. Therefore, defendant's argument that trial counsel failed to preserve this issue by objection below is simply incorrect.

credibility was so low that their admission constituted plain error. Prejudice was minimized where the prosecutor only briefly questioned defendant regarding his past convictions and did not comment on the convictions in closing arguments. Also, as previously indicated, there was strong evidence of defendant's guilt. Accordingly, the admission of the past convictions did not affect defendant's substantial rights.

Next, defendant argues the trial court improperly excluded evidence and denied him a constitutional right to present a defense. We disagree.

It is within the trial court's discretion whether to admit evidence, and its decision will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Our Supreme Court has noted: "Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 933 S Ct 1038; 35 L Ed 2d 297 (1973). Generally all relevant evidence is admissible. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1988). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Sabin*, *supra* at 58.

Defendant offered a videotape to show that one of his alibi witnesses was intimidated during her interrogation. The court excluded the tape as unfairly prejudicial to defendant because it revealed a polygraph exam and mentioned that a conviction for armed robbery could result in a life sentence. The tape was only marginally relevant and contained statements that were prejudicial to defendant. The same evidence regarding the alleged intimidation could have been elicited from defendant's girlfriend without the attendant danger of unfair prejudice presented by the tape. Moreover, the court exercised its discretion and allowed defendant to question the officer who performed the interrogation on his interrogation techniques. We find no abuse of discretion.

Next defendant argues that there was insufficient evidence to support his conviction of malicious destruction of a building. We disagree.

Due process requires the prosecution to introduce sufficient evidence that could justify a trier of fact in concluding a defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court reviews claims of insufficient evidence de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), in a light most favorable to the prosecution, *Johnson*, *supra* at 723. By the plain language of MCL 750.380, malicious destruction of a building causing less than \$200 in damages consists of (1) the building belonging to a person other than defendant, (2) the defendant destroying or "injur[ing]" the building, (3) the defendant acting willfully and maliciously in doing so, and (4) the extent of the damage being some amount less than \$200. MCL 750.380(1), (5).

There was sufficient evidence to support defendant's conviction of malicious destruction of a building. First, the property clearly belonged to the Oxford Police Department. Second, a reasonable juror could easily have inferred that defendant "injured," i.e., damaged, the building.

Circumstantial evidence and the reasonable inferences that arise from the evidence can adequately establish the elements of the crime. *Carines, supra*, 460 Mich 757. An officer testified that sometime after defendant was removed from the holding cell, he lodged another suspect in the cell who immediately notified officers that some pieces of aluminum angle iron were in the cell. No other suspect occupied the cell after defendant. The angle irons are usually attached to the cell door about four feet off the ground and hold the plexiglass which covers the door.

The prosecution exhibited a surveillance tape of the cell. The tape shows defendant pulling at the aluminum bars on the door located about four feet off the ground, squatting down, and apparently yanking at something. This evidence easily supports an inference that defendant damaged the property. Third, defendant's intent can be inferred from his actions. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). Willfulness indicates a purposeful act. *People v Fennell*, 260 Mich App 261, 268-269; 677 NW2d 66 (2004). In this regard, it is apparent that the damage to the building was willful because there was no plausible basis for a claim of accident. Finally, the parties stipulated that the extent of damage was less than \$200.

Next, defendant argues that the trial court erred in scoring ten points for both offense variable four ("OV 4") and offense variable fourteen ("OV 14") of the sentencing guidelines. We disagree.

This Court reviews a trial court's factual findings at sentencing for clear error. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citations omitted). Thus, this Court reviews scoring decisions to determine whether discretion was properly exercised and whether the evidence properly supported the scores. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

OV 4 requires the court to assess ten points if "serious psychological injury requiring professional treatment occurred to the victim." MCL 777.34(1)(a). "[T]he fact that treatment has not been sought is not conclusive." MCL 777.34(2). In this case, the victim was assaulted in the middle of the night by a masked perpetrator carrying what she believed was a gun, grabbed around the neck, and ordered to the ground. She testified that she was scared during the incident and remained upset for the rest of the evening. The responding officers found her crouched on the floor in front of the counter crying and in a frantic state. The evidence supports a finding that the victim experienced trauma of a nature requiring psychological treatment. Thus, the court did not err in scoring ten points for OV 4.

OV 14 requires the court to assess ten points if the offender "was a leader in a multiple offender situation." MCL 777.44(1)(a). Testimony indicates that defendant, Cochran and Worley participated in the robbery. However, defendant appeared to be coordinating the activity. Cochran testified that defendant told him that he was planning to "hit a lick," which he understood to mean robbery, about one week before the incident. Cochran also testified that on the night of the incident, defendant ordered him to go see if anyone was in the relevant store. Defendant was the only participant who donned a disguise and carried what appeared to be a weapon. According to Cochran, he and Worley acted as "look outs" for defendant. The

evidence supports a finding that defendant was a leader in committing the robbery. Thus, the court did not err in scoring ten points for OV 14.

Next, defendant argues that the trial court erred by not stating on the record its reason for the sentence as required by MCR 6.425(D)(2)(e) and by imposing a maximum sentence that violates the principle of proportionality and violates his constitutional right to be free of cruel or unusual punishment. We disagree.

Defendant failed to properly preserve this issue. Because the Court's minimum sentence of 180 months' imprisonment was well within the guidelines sentencing range, review of nonconstitutional issues is precluded. "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), quoting MCL 769.34(10). However, MCL 769.34(10) cannot preclude review of defendant's constitutional claim that the court violated his right to be free from cruel or unusual punishment by sentencing him to a maximum sentence of forty years' imprisonment. This Court is generally empowered to review unpreserved constitutional issues. *People v Davis*, 250 Mich App 357, 364; 649 NW2d 94 (2002).

The statutory maximum for armed robbery allows the court to sentence defendant to "imprisonment for life or for any term of years." MCL 750.529. The habitual offender statute allowed the court to sentence defendant "to imprisonment for life or for a lesser term." MCL 769.12(1)(a). Because defendant's maximum sentence was within the sentencing guidelines' range (life or any term of years), it did not constitute unconstitutional cruel or unusual punishment. See *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004). Further, "a proportionate sentence does not constitute cruel or unusual punishment." *Id.* at 92. And a sentence within the guidelines' range is proportionate absent a substantial and compelling reason to depart. See *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003). We further note that the trial court's reference to the sentencing guidelines when imposing a sentence within the guidelines is sufficient to satisfy the MCR 6.425(D)(2)(e) articulation requirement. *People v Bailey (On Remand)*, 218 Mich App 645, 646-647; 554 NW2d 391 (1996).

Finally, defendant argues in his supplemental brief that *Blakely v Washington*, 542 US \_\_\_, 124 S Ct 2531, 159 L Ed 2d 403 (2004), mandates reversal because the jury verdict did not encompass all the findings made by the trial court in scoring the OV factors, and defendant did not acknowledge the truth of the facts used in scoring to justify the length of sentence. Defendant's reliance on *Blakely* is misplaced. Our Supreme Court has stated that *Blakely*, which reviewed Washington State's determinate sentencing scheme, does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Moreover, we do not believe the decision in *United States v Booker*, \_\_\_ US \_\_\_, 125 S Ct 738; 160 L Ed 2d 621 (2005), undermines this statement in *Blakely* because the *Booker* court found no distinction between the procedures at issue in *Blakely* and the Federal Sentencing Guidelines. In contrast, the *Claypool* Court viewed Michigan's sentencing scheme to be distinguishable from *Blakely*.

Affirmed.

/s/ Donald S. Owens

/s/ David H. Sawyer

I concur in result only.

/s/ Helene N. White